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INTRODUCTION

David Resnick was accused of sexually abusing two young boys, among other charges.[1] FBI special agents twice asked Resnick to submit to a polygraph examination, and twice he refused.[2] In his first refusal, Resnick asserted that he would have to speak to his lawyer before submitting to the polygraph test, noting that polygraph tests were unreliable.[3] At trial the prosecution introduced testimony about Resnick's refusal to take a polygraph test and argued it was evidence of his guilt during closing arguments.[4] After a four-day trial, the jury

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[1] United States v. Resnick, 823 F.3d 888, 891 (7th Circ. 2016), *reh'g en banc denied*, 835 F.3d 658, 660 (7th Cir. 2016).

[2] *Id.* at 900 (Bauer, J., dissenting)

[3] *Id.*

[4] *Id.*

convicted Resnick on all four counts[5] and he was sentenced to life imprisonment.[6]

In *United States v. Resnick*, since the defense did not object to the prosecution's adversarial use of Resnick's refusal to take a polygraph test at trial, the Seventh Circuit applied plain error review to assess whether Resnick's conviction should be reversed.[7] After applying plain error analysis, the majority held that even though the prosecution *might* have violated Resnick's Fifth Amendment right against self-incrimination, the violation nonetheless failed to rise to the level of plain error.[8]

Plain error analysis is the type of appellate review applied when a party fails to object to an error at the moment it happens during trial.[9] Because of the interest in the finality of judgments, parties are encouraged to make timely objections.[10] To incentivize timely objections, Rule 30 of the Federal Rules of Criminal Procedure prescribes that a party loses its right to appeal an error if an objection to it is not contemporaneously made.[11] However, cases from the early twentieth century held that the public interest required that courts correct errors that harmed the integrity of the judicial system, even when such errors were not timely objected to.[12]

In the last thirty years, the plain error doctrine has changed substantially both in principle and in form. Interpretations by the United States Supreme Court have vastly departed from its original

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[5] The counts included aggravated sexual abuse of a minor, interstate transportation of child pornography, brandishing a firearm in furtherance of a crime, and being a felon in possession of a firearm. *Id.* at 892.

[6] *Id.* In addition to the life sentence, Resnick received a consecutive seven-year sentence.

[7] *Id.* at 896.

[8] *Id.* at 898.

[9] United States v. Olano, 507 U.S. 725, 731-32 (1993); United States v. Frady, 456 U.S. 152, 162-63 (1982).

[10] *See Frady*, 456 U.S. at 163.

[11] *Id.* at 162.

[12] *See* United States v. Atkinson, 297 U.S. 157, 160 (1936); New York C.R. Co. v. Johnson, 279 U.S. 310, 318 (1929).

articulation. Rather than serving as a protection for both the accused and the whole of society, its current rigidity provides restitution for only those lucky enough to be able to prove their innocence, with little regard for the public's faith in the fairness of our justice system. The principles in which plain error review is grounded must be revisited and the standard revised.

Part I of this article examines the Supreme Court's interpretation of the plain error doctrine within the last thirty years and the resultant inconsistent applications by the Court and the Seventh Circuit. Part II of this article analyzes and critiques *Resnick*'s holding. Finally, Part III proposes a revised version of plain error review more closely aligned with the spirit of the original standard.

PLAIN ERROR REVIEW

A. Background

Federal Rule of Criminal Procedure 52(b) is a codification of the plain error review standard set forth in *United States v. Atkinson*.[13] Rule 52(b) provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[14]

In *Atkinson*,[15] the Supreme Court acknowledged that a verdict would not ordinarily be set aside for an error not objected to at trial.[16]

[13] United States v. Young, 470 U.S. 1, 7 (1985).

[14] Fed. R. Crim. P. 52(b).

[15] 297 U.S. 157 (1936). *Atkinson* involved a civil action brought against the United States by a plaintiff seeking payment from war risk insurance. He claimed that under the policy, loss of hearing in both ears constituted a total disability. The district court found against the government. On appeal, the government claimed that the jury instruction erroneously stated that the jury could find for the plaintiff on the theory that the plaintiff's loss of hearing in both years, if permanent, was a permanent disability as defined by the policy. The Fifth Circuit affirmed the district's court's holding. The Supreme Court, noting that the government had failed to make a timely objection to the jury instruction, held that any potential error presented by the government was not exceptional enough to correct. *Id.* at 158-60.

[16] *Id.* at 160.

The Court, however, conceded that an appellate court could, under special circumstances, make an exception to this rule.[17] The Court went on to explain when this exception might be appropriate:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, *if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings*.[18]

This came to be known as the original plain review standard.[19] This standard focused on the obviousness of the error and its effect on judicial fairness, reputation, and integrity.[20] In other words, an error was reversible if it was so palpable that not addressing it would harm the integrity of the judicial system or if the error tarnished the judicial system in any other way.[21] After the *Atkinson* standard was codified by Rule 52(b) in 1944, the type of analysis to determine whether there was an error in need of curing came to be known as "plain error review."[22] Today's incarnation of this standard is very distinct from the original version.[23] Rather than focusing on the effect of the error on

[17] *Id.*

[18] *Id.* (emphasis added). *Johnson*, which *Atkinson* cited after laying down its standard, placed emphasis on the fact that the integrity and fairness of trials were of public concern and that this public imperative gave the court authority to correct trial errors even when objections were not timely made. "The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error." *Johnson*, 279 U.S. at 318-19 (citing Brasfield v. United States, 272 U.S. 448, 450 (1926)).

[19] *See* United States v. Young, 470 U.S. 1, 7 (1985).

[20] *See Atkinson*, 297 U.S. at 160.

[21] *See id.*; *Johnson*, 279 U.S. at 318-19.

[22] *See* Fed. R. Crim. P. 52(b).

[23] *See* United States v. Olano, 507 U.S. 725, 731-37 (1993).

the public's faith in the judicial system, the standard now narrowly centers on the outcome of the particular case.[24]

B. Inconsistent Application of Plain Error Review by the Supreme Court

In the last thirty years, the Supreme Court has interpreted the plain error review standard inconsistently in different cases, leading to confusion about the standard's proper application. This inconsistency is evidenced by the Court's decisions in *United States v. Young*,[25] *United States v. Olano*,[26] *Johnson v. United States*,[27] and *United States v. Dominguez Benitez*.[28]

In *Young*, the Court deviated from the *Atkinson* paradigm and added an additional variable to plain error analysis—the weight of the evidence against the accused.[29] This deviation laid the foundation for the current version of plain error review in which the error is looked at side-by-side with the evidence against the defendant.[30] The addition of this variable initiated the Court's shift away from the *Atkinson* framework toward a standard more closely resembling the cause and actual prejudice standard used in collateral review.[31]

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[24] *See id.*; *Young*, 470 U.S. at 19-20.

[25] 470 U.S. 1 (1985).

[26] 507 U.S. 725 (1993).

[27] 520 U.S. 461 (1997).

[28] 542 U.S. 74 (2004).

[29] *See Young*, 470 U.S. at 19-20.

[30] *See id.*

[31] A collateral challenge is an appellate request when no timely objection was made at trial and after the the time allotted to file an appeal has expired. Because of this, collateral attacks present a higher hurdle to claimants. The type of review applied to this type of appeal is called the cause and actual prejudice standard. Under this standard a convicted defendant must show both (1) a good reason why he failed to make a timely objection and a timely appeal and (2) that the error caused him *actual* prejudice. This standard is more stringent than plain error review and requires a heightened showing of prejudice. *See* United States v. Frady, 456 U.S. 152, 165-68 (1982).

The *Young* Court summarized the plain error standard as a rule to be "used sparingly, solely under those circumstances in which a miscarriage of justice would otherwise result."[32] Importantly, in its description of the plain error standard, the Court included the second disjunctive prong of the Atkinson standard (serious effect on "the fairness, integrity or public reputation of judicial proceedings") while omitting the first ("if the errors are obvious").[33] The Court proceeded to explain that plain error analysis must also involve evaluating the error against the entire trial record.[34]

The Court concluded that a prosecutor's remarks expressing his personal belief as to the defendant's guilt, and admonitions to the jury to "do their job" and convict the defendant, although improper, did not unfairly sway the jury.[35] The majority found that the prosecutorial remarks did not undermine "the fairness of the trial and contribute to a miscarriage of justice" because the weight of the other evidence against the defendant was substantial enough for the jury to hang its hat on.[36] The Court pointed to the fact that not a single witness had supported the defense and that the substantial and uncontradicted evidence indicated, beyond any doubt, the defendant's deliberateness to defraud a customer.[37]

In his dissent, Justice Brennan, joined by Justice Marshall and Justice Blackmun, cited to *Atkinson* and expressed that a plain error requires reversal of a conviction if the error may be said "either (1) to

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[32] *Young*, 470 U.S. at 15 (quoting *Frady*, 456 U.S. at 163, n. 14).

[33] *See id.* at 15; United States v. Atkinson, 297 U.S. 157, 160 (1936) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, *if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.*") (emphasis added).

[34] *Young*, 470 U.S. at 16.

[35] *Id.* at 18.

[36] *Id.* at 19.

[37] *Id.* ("Finally, the overwhelming evidence of respondent's intent to defraud Apco and submit false oil certifications to the Government eliminates any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations or exploited the Government's prestige in the eyes of the jury.").

have created an unacceptable danger of prejudicial influence on the jury's verdict, *or* (2) to have 'seriously [affected] the … integrity or public reputation of [the] judicial proceedings."[38] Notably, Justice Brennan kept the standard as a disjunctive test, with either the first or second prong satisfying the standard.[39] After concluding that, contrary to the majority's opinion, there were facts to establish that the prosecutor's remarks led to "*possible prejudice*"[40] to the defendant, Justice Brennan noted that the majority failed to consider the second disjunctive *Atkinson* prong - whether the prosecutor's misconduct "seriously [affected] the … integrity or public reputation of [the] judicial proceedings."[41] Justice Brennan expressed concern that prosecutorial improprieties such as the one in this case might present a recurring problem thus endangering the integrity and public reputation of the judicial system.[42] Similar to Justice Brennan, Justice Stevens, in a separate dissent, also highlighted the effect of the error on the integrity of the judicial system as an important plain error review factor.[43]

In *United States v. Robinson*, 485 U.S. 25 (1988), three years after *Young* was decided, Justice Blackmun acknowledged that the *Young* Court had essentially broken down the *Atkinson* plain error standard into a two-part *conjunctive* inquiry: [44] "whether the error 'seriously

[38] *Id.* at 30 (Brennan, J., dissenting) (emphasis added).

[39] *Id.*

[40] It is important to note that the term "possible prejudice" is contrary to the majority's belief that the error, when looked at against the evidence, must show that prejudice existed, not just that it was possible. Justice Brennan's use of the term "prejudicial impact" further alludes to his belief that a showing of actual prejudice is not required. *See id.* at 31-32.

[41] *Id.* at 33 (Brennan, J., dissenting).

[42] *Id.*

[43] *See id.* at 37 (Stevens, J., dissenting) ("I do not understand how anyone could dispute the proposition that the prosecutor's comments were obviously prejudicial. Instead, the question is whether the degree of prejudice buttressed by the legitimate interest in deterring prosecutorial misconduct, is sufficient to warrant reversal.").

[44] *See* United States v. Robinson, 485 U.S. 25, 35 (1988) (Blackmun, J., concurring in part, dissenting in part). It is important to note that the original plain

affected substantial rights,' *and* whether the error 'had an unfair prejudicial impact on the jury's deliberations.'"[45] Although Justice Blackmun agreed that plain error analysis required some form of prejudicial impact inquiry, he expressed that the *Young* majority's failure to define the prejudice prong did more harm than good.[46] Justice Blackmun proposed that to clear the confusion, the Court should either formulate a plain error test articulating the prejudice standard, or it should embrace plain error's lack of rigidity and assert that its language in *Young* should not be interpreted as a test.[47] He then suggested that a less rigid application of plain error review would be more faithful to the purpose of the plain error doctrine.[48]

Seven years after *Young* was decided, the Supreme Court in *United States v. Olano*[49] took the former of Justice Blackmun's suggestions by creating a more rigid application of plain error review and positing a four-part inquiry focusing heavily on the issue of prejudice.[50] The issue considered in *Olano* was whether it was plain error for the district court to have allowed an alternate juror to be present during deliberations without obtaining individual waivers from all seven defendants.[51] In applying *Young's* two-part plain error

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error standard (*Atkinson* standard) was a disjunctive inquiry—plain error could be found if "the errors are obvious, *or* if they *otherwise* seriously affect the fairness, integrity or public reputation of judicial proceedings." United States v. Atkinson, 297 U.S. 157, 160 (1936) (emphasis added).

[45] *Robinson*, 485 U.S. at 35 (emphasis added). Can't use id- previous cite has two citations.

[46] *Id.* ("While any application of the plain-error doctrine necessarily includes some form of prejudice inquiry, the Court's attempt to isolate that inquiry without giving it any substantive definition may have produced more mischief than clarity.").

[47] *See id.* at 36-37.

[48] *See id.* (quoting *Atkinson*, 297 U.S. at 160) (suggesting that appellate courts should have more discretion to consider circumstances in which allowing a "conviction to stand would severely undermine 'the fairness integrity or public reputation of judicial proceedings.'").

[49] 507 U.S. 725 (1993).

[50] *See* United States v. Olano, 507 U.S. 725, 732-37 (1993).

[51] *Id.* at 729-30. Federal Rule of Criminal Procedure 24(c) prohibits the presence of alternate jurors during final jury deliberations: "… An alternate juror

analysis, the Ninth Circuit Court of Appeals first held that the district court erred in allowing the alternate juror's presence during deliberations.[52] The Ninth Circuit explained that although the juror did not vocally participate in the deliberations, it was *possible* that the alternate juror conveyed his or her attitudes through body language, therefore having *some* effect on the other jurors' decision.[53] Next, the Ninth Circuit answered the two-part plain error inquiry by concluding that the violation was in plain error "because the violation was inherently prejudicial *and* because it infring[ed] upon a substantial right of the defendants."[54]

The Ninth Circuit's application of plain error review prompted the Supreme Court to grant certiorari for the purpose of clarifying the standard.[55] Attempting to unpack the broad language of Rule 52(b), the Court broke down plain error review into four distinct elements.[56]

First, there must be an error.[57] Any deviation from a legal rule is an "error" unless the defendant intentionally waived that rule.[58] Second, the error must be plain.[59] In order for an error to be "plain," the legal rule must be clear or obvious under current law.[60]

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who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." *Id.* at 730 (quoting Fed R. Crim. P. 24(c)).

[52] *Id.* at 730.

[53] *Id.* at 730-31.

[54] *Id.* at 731 (emphasis added).

[55] *See id.*

[56] *See id.* at 732-37.

[57] *Id.* at 732-33.

[58] *Id.* at 733-34 ("If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection."). As an example of intentional waiver, the court explained that a defendant who knowingly and voluntarily pleads guilty cannot then have his conviction overturned by an appellate court on the ground that the trial court erred in not granting him a trial. *Id.* at 733.

[59] *Id.* at 734.

[60] *Id.*

Third, the error must affect substantial rights.[61] The Court equated "substantial rights" with prejudice[62] and interpreted it to mean that the plain error must have affected the outcome of the district court proceedings.[63] In other words, the error must have been prejudicial to the defendant.[64] In its attempt to articulate what "prejudice" meant in the context of plain error review, the Court explained that appellate courts must determine whether the error "had a prejudicial impact on the jury's deliberations."[65] The Court emphasized that normally the defendant must make a specific showing of prejudice to satisfy the "affecting substantial rights" prong.[66] Fourth, plain error may only be noticed to prevent a miscarriage of justice.[67] The Court explained that although an appellate court *may* correct a plain error that affected a defendant's substantial rights, it is not obligated to do so unless it would result in a "miscarriage of justice."[68] Specifically, the Court asserted that a plain error affecting substantial rights should *only* be corrected *if*, after satisfying the preceding three prongs, the error also

[61] *Id.*

[62] The Court later proclaimed that it need not decide whether "affecting substantial rights" is always synonymous with "prejudicial." *Id.* at 735.

[63] *Id.* at 734.

[64] *Id.*

[65] *Id.* (quoting United States v. Young, 470 U.S. 1 at 17, n. 14). The Court differentiated harmless error review from plain error review and explained that although the two share the same basic inquiry, was the error prejudicial, in plain error review it is the defendant, and not the prosecution, that bears the burden to persuade the court that he or she was prejudiced by the error. *Id.*

[66] *Id.* at 735. The Court also stated that there might be a special category of forfeited errors that could be corrected regardless of their impact on the outcome of the case, as well as cases in which the errors should be presumed to be prejudicial and require no proof from the defendant. *See id.* Unfortunately, the Court declined to explain when those special circumstances would apply.

[67] *Id.* at 736.

[68] *Id.* (noting that in the collateral review context, "the term 'miscarriage of justice' means that the defendant is actually innocent," but that Rule 52(b) is not a remedy only for cases in which the defendant is actually innocent).

"seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[69]

After applying this four-part inquiry to the facts of the case, the majority concluded that although allowing the alternate juror to be present during the jury deliberations was plain error, the error did not affect the defendants' substantial rights.[70] The Court explained that the ultimate question in its application of the third prong, was whether the error affected the jury's deliberations and verdict either specifically or presumptively.[71] In holding that there was no prejudicial effect, therefore no substantial rights violation, the Court pointed to the fact that the record contained no direct evidence that the alternate juror's presence influenced the verdict.[72] Specifically, the Court explained that the defendants failed to show that the alternate juror either participated in the deliberation or produced a chilling effect on the regular jurors with his or her body language.[73] The Court also declined to presume that the error was inherently prejudicial, as the Ninth Circuit had done.[74] The Court reasoned that because the alternate juror was instructed by the judge not to participate in the deliberations, the Ninth Circuit should not have presumed that this instruction had been disregarded.[75] Because the third prong of the Court's plain error test was not satisfied, the Court did not consider the fourth—whether the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings."[76]

Contrary to the majority, the three dissenters in *Olano*, led by Justice Stevens, concluded that the defendants' substantial rights had

[69] *Id.* 736-37 ("a plain error affecting substantial rights does not, without more, satisfy the *Atkinson* standard …").

[70] *Id.* at 737-38.

[71] *Id.* at 739.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 740.

[75] *See id.* ("[It is] the almost invariable assumption of the law that jurors follow their instructions.") (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)).

[76] *Id.* at 741.

been violated.[77] Justice Stevens de-emphasized the importance of prejudicial impact in plain error review and instead stressed the importance of preventing injury to the integrity of the judicial system.[78] Some defects affecting the jury's deliberative function, he explained, are subject to reversal regardless of whether the defendant can show prejudice, "not only because it is so difficult to measure their effects on a jury's decision, but also because such defects 'undermine the structural integrity of the criminal tribunal itself.'"[79]

The opinions in *Johnson v. United States*[80] and *United States v. Dominguez Benitez*[81] reflect how difficult *Olano* made plain error analysis to apply. In *Johnson*, the petitioner argued that the district court had committed plain error in deciding the element of materiality in a perjury case instead of submitting that issue to the jury.[82] After determining that the current law stated that the jury must decide the question of materiality in a perjury case, the Court determined that the lower court had committed an error and the error was plain.[83] The Court then decided that because the defendant failed to meet the fourth prong of the *Olano* test, it need not decide the third.[84]

As in *Olano*, the Court in *Johnson* focused heavily on the prejudice component—the error's effect on the outcome of the defendant's case.[85] However, instead of applying the prejudice inquiry to the third prong of the *Olano* test, the Court applied it to the fourth

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[77] *Id.* at 743 (Stevens, J., dissenting).

[78] *See id.* at 743-44 (Stevens, J., dissenting) (returning to the original *Atkinson* standard where plain error may be found "if the errors are obvious, *or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings*") (emphasis added).

[79] *Id.* at 743 (quoting Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986)).

[80] 520 U.S. 461 (1997)

[81] 542 U.S. 74 (2004).

[82] *Johnson*, 520 U.S. at 463.

[83] *Id.* at 467.

[84] *Id.* at 469 (explaining that even assuming the error did affect substantial rights of the defendant, there was no plain error because the defendant was not able to meet the fourth *Olano* prong).

[85] *See id.* at 469-70

(whether not noticing the error would result in a miscarriage of justice).[86] The Court concluded that the fourth prong was not met because the defendant had failed to show that the error had prejudiced the outcome of his case.[87] It explained that the evidence supporting the materiality of the false statement was overwhelming and uncontroverted at trial.[88] Therefore, the Court continued, whether the issue of materiality would have gone to the jury instead of mistakenly going to the judge made no difference in the outcome of the trial; the jury, like the judge, would have also decided that the false statement was material.[89] By applying a prejudice inquiry to the fourth prong, the *Johnson* Court expanded the weight to be given to prejudice, creating a higher hurdle for plain error appellants and pushing the focus of plain error review further away from the original *Atkinson* standard.[90]

In *Dominguez Benitez*, the Court asserted a standard of measurement for determining whether the degree of prejudice was enough to satisfy *Olano's* substantial rights prong.[91] The Court followed *United States v. Bagley*,[92] in invoking a reasonable probability standard—a requirement that a defendant show "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different."[93] The Court explained that a court may notice a plain error if after reviewing the entire record, the

[86] *See id.*

[87] *See id.*

[88] *Id.* at 470.

[89] *See id.*

[90] Recall that the original standard in *Atkinson* was more broadly focused on the error's effect on the integrity of the court and the public's faith in it. *See* United States v. Atkinson, 297 U.S. 157, 160; *see also* New York C.R. Co. v. Johnson, 279 U.S. 310, 318-319 (emphasizing that trials are never purely just about the litigants involved and the public's interests must be served).

[91] *See* United States v. Dominguez Benitez, 542 U.S. 74, 81-83 (2004).

[92] 473 U.S. 667, 682 (1985).

[93] *Dominguez Benitez*, 542 U.S. at 82-83.

probability of a different result is "'sufficient to undermine confidence in the outcome of the proceeding."[94]

In his concurrence, Justice Scalia drew attention to the confused state of prejudice standards.[95] He pointed out that the Court at the time had adopted at least four different standards for assessing prejudice.[96] Among these were: (a) the harmless beyond a reasonable doubt standard for use on direct review of a constitutional error and conviction;[97] (b) the substantial and injurious effect or influence standard for use on collateral review;[98] (c) the reasonable probability standard such as the one used by the majority in the present case;[99] and (d) the less-defendant friendly more likely than not standard for use on claims of newly discovered evidence after conviction.[100] Noting the difficulty of applying different gradations of prejudice to hypothesized outcomes,[101] he concluded that the traditional "beyond a reasonable doubt" and "more likely than not" standards were the only workable standards for plain error prejudice analysis.[102]

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[94] *Id.* at 83.

[95] *See id.* at 86-87 (Scalia, J., concurring).

[96] *Id.* at 86.

[97] *See* Chapman v. California, 386 U.S. 18, 24 (1967), *superseded by statute*, The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (2016), *as recognized in* Perkins v. Herbert, 596 F.3d 161, 175 (2d Cir. 2010).

[98] *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

[99] *See* United States v. Agurs, 427 U.S. 97, 111-13 (1976); Strickland v. Washington, 466 U.S. 668, 694 (1984).

[100] *See Strickland*, 466 U.S. at 693-94.

[101] *See Dominguez Benitez*, 542 U.S. at 86 ("Such ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking.").

[102] *Id.* at 87 ("I would hold that, where a defendant has failed to object at trial, and thus has the burden of proving that a mistake he failed to prevent had an effect on his substantial rights, he must show that effect to be probable, that is, more likely than not.").

C. Inconsistent Application of Plain Error Review by the Seventh Circuit

The confusion as to the correct application of plain error analysis has led the Seventh Circuit to produce inconsistent holdings.[103] In *United States v. Paladino*,[104] the Seventh Circuit Court acknowledged this confusion as it struggled to differentiate the "substantial rights" prong from the "fairness and integrity" prong of *Olano*.[105] It suggested two different sets of interpretations for both of these prongs.[106]

The first, more rigid, interpretation was that the third element, "substantial rights," required a showing of prejudice—but for the error, the verdict might have been different. The fourth element, "fairness, integrity, or public reputation" required a showing that, absent intervention by an appellate court, there would be a miscarriage of justice—the result would be intolerable (such as the conviction of an innocent person). [107]

The second, more lenient, interpretation suggested by the Seventh Circuit was that the showing of prejudice should be applied to the fourth prong, not the third.[108] The court proposed that in this second interpretation, "substantial rights" referred to an important right, rather than a mere technical right, and that to satisfy the fourth prong, a defendant must show prejudice – the *likelihood* that the verdict 'was actually affected by the error.'"[109]

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[103] *Compare* United States v. Tucker, 714 F.3d 1006 (7th Cir. 2013); United States v. Hills, 618 F.3d 619 (7th Cir. 2010); United States v. Ochoa-Zarate, 540 F.3d 613 (7th Cir. 2008); United States v. Paladino, 401 F.3d 471 (7th Cir. 2005) *with* United States v. Resnick, 823 F.3d 888, 891 (7th Circ. 2016), *reh'g en banc denied*, 835 F.3d 658 (7th Cir. 2016).

[104] 401 F.3d 471 (7th Circ. 2005).

[105] *See id.* at 481 ("[T]he difference between the 'substantial rights' and 'fairness, integrity, or public reputation' elements of the plain error standard is not entirely clear.").

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 482 (emphasis added).

Even though the majority declined to express which interpretation the court should adopt,[110] it proceeded to explain plain error review in terms of requiring a showing of probable prejudice and of innocence.[111] In his dissent, Judge Ripple, joined by Judge Kanne, acknowledged that the majority had implicitly adopted the more stringent plain error interpretation, and he rejected this rigid interpretation.[112]

Similar to the error in *Resnick*, the alleged error in *United States v. Hills* involved a Fifth Amendment violation.[113] In *Hills*, a defendant who had been convicted of conspiracy and filing false tax returns, alleged that the prosecution had committed misconduct when it made negative remarks in its closing argument about invoking the Fifth Amendment right not to testify.[114] Since the defense had failed to object to the prosecutor's comments at trial, the court began its analysis by iterating the *Olano* four-part plain error review test.[115]

The court first determined that the prosecution's comments were made in error because it cast the defendant's invocation of her constitutional right in a negative light, which the court explained was the very thing the right against self-incrimination sought to protect.[116]

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[110] *See id.* (reasoning that since there was plain error under the more rigid test, the court need not pick which of the two interpretations should be applied).

[111] *See id.* ("If an error is committed and the defendant is convicted, the appellate court has only to consider whether the defendant would probably have been acquitted had the error not occurred. If so—if the error may well have precipitated a miscarriage of justice (which the conviction of an innocent person is)—it is plain error and the defendant is entitled to a new trial."). Importantly, the challenged error in this case happened during the sentencing phase as opposed to the guilt determination phase. *See id.*

[112] *See id.* at 486 (Ripple, J., dissenting).

[113] 618 F.3d 619, 639 (7th Cir. 2010).

[114] *Id.* The prosecution made the following remarks: "And you don't really need to worry about the Fifth Amendment protection unless you're worried that you're [d]oing something illegal;" "They're using the Fifth Amendment not as a shield to protect themselves from incrimination, but as a sword to prevent the IRS from getting the information that they are entitled to." *Id.* at 640.

[115] *Id.* at 639-40.

[116] *Id.* at 641.

Next, the court held that the district court's allowance of the prosecutorial statements was plain error for two reasons.[117] First, the court explained that the district judge had expressly warned the prosecution to refrain from referring to the Fifth Amendment, and yet the prosecution proceeded to reference the Fifth Amendment anyway.[118] Second, and most importantly, the court applied the prejudice test to the *second* prong.[119] The court honed in on the egregiousness of the error itself explaining that there was more than a "nontrivial possibility" that the references might have determined the outcome of the case.[120] In applying the crucial prejudice test to the error itself, the court shifted the focus of the analysis to the gravity of the error itself, away from the determinative influence of other evidence.

After establishing that the prosecutorial remarks were plain error, the court moved on to the third *Olano* inquiry—whether the error affected the defendant's substantial rights.[121] The analysis the court employed in determining this third prong consisted of a consideration of five harmless error[122] factors: "(1) the intensity and frequency of the references, (2) which party elected to pursue the line of questioning, (3) the use to which the prosecution put the silence, (4) the trial judge's opportunity to grant a motion for a mistrial or give a curative instruction, and (5) the quantum of other evidence indicative of guilt."[123]

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[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Harmless error, codified as Federal Rule of Criminal Procedure 52(a), is another type of direct appellate review where there is a "consideration of error raised by a defendant's timely objection, but subject to an opportunity on the Government's part to carry the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights." United States v. Vonn, 535 U.S. 55, 62 (2002).

[123] *Hills*, 618 F.3d at 641.

Subsequent to applying these five factors, the Seventh Circuit held that the prosecutorial remarks had affected the defendant's substantial rights.[124] The court explained that despite the judge's explicit warning to refrain from doing so, the prosecution twice made reference to the Fifth Amendment, the judge did not procure any curative measures to prevent the jury from making improper use of the remarks, and all of the evidence against the defendant was circumstantial.[125]

Finally, in concluding that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, the court reasoned that if it failed to correct this error, the government would feel entitled to intrude on defendants' Fifth Amendment rights in future cases.[126] The Seventh Circuit explained that this would disenfranchise the public from their constitutional right, thereby injuring the integrity of the judicial system and the respect for constitutional rule of law.[127]

UNITED STATES V. RESNICK

A. Resnick Opinion

The *Resnick* majority, consisting of Judge Wood and Judge Sykes, held that the prosecution's incriminating use of Resnick's refusal to take a polygraph exam did not rise to the level of plain error.[128] Justice

[124] *Id.*

[125] *Id.* at 641-42. Curiously, earlier in the opinion, the court had rejected another appeal made by the defendant in which she claimed that the evidence introduced against her at trial had not been sufficient to support both of her convictions. In addressing this claim, the court concluded there was strong enough circumstantial evidence for her conspiracy conviction, and that "there was more than enough circumstantial evidence to establish that she was guilty of filing false tax returns. *Id.* at 638-39.

[126] *Id.* at 642.

[127] *Id.*

[128] United States v. Resnick, 823 F.3d 888, 898 (7th Circ. 2016), *reh'g en banc denied*, 835 F.3d 658 (7th Cir. 2016).

Bauer dissented.[129] After applying the *Olano* four-pronged test for plain error, the court reasoned that any error by the prosecution was not plain and did not affect Resnick's substantial rights in light of the whole record.[130]

1. Plain Error

The court explained that it had no need to answer the first *Olano* question of whether the prosecution's introduction of Resnick's silence was erroneous.[131] It reasoned that because any error was not plain, there was no need to decide this preliminary inquiry.[132] In considering whether the prosecution's actions were *plain* error, the court discussed two potential types of error the prosecution might have committed—evidentiary and constitutional.[133]

First, the court considered whether the district court violated any evidentiary rules by admitting Resnick's refusal to take a polygraph test into evidence.[134] The Seventh Circuit began by agreeing with Resnick about the dubiousness of polygraph exams and the risk of unfair prejudice.[135] It noted that while the judicial and scientific communities were well aware of the criticism polygraph tests face, lay people still assigned the polygraph an "aura of infallibility," which could cause jurors to heavily rely on polygraph evidence to assess credibility and guilt.[136] After asserting a litany of cases across different jurisdictions that rejected polygraph evidence, either through dicta or

[129] *Id.* at 890.
[130] *See id.* at 898.
[131] *Id.*
[132] *Id.*
[133] *Id.* at 896-98.
[134] *Id.* at 896-97
[135] *Id.*
[136] *Id.* at 897.

per se rules, the Seventh Circuit averred that its own precedent pointed only towards the exclusion of polygraph evidence.[137]

However, the court also stated that, unlike other circuits, it had never established a blanket rule excluding the use of polygraph evidence.[138] Instead, the court continued, the Seventh Circuit had given district courts substantial discretion on the issue.[139] The court concluded by stating that because the law on polygraph evidence was not settled and the case against Resnick was "airtight," it could not definitively say that admitting the refusal to submit to a polygraph was plain error.[140]

Next, the court turned to the issue of whether Resnick suffered a Fifth Amendment violation by having his right to silence used against him.[141] The court began by acknowledging that a polygraph examination is almost always a custodial interrogation triggering *Miranda* rights.[142] Therefore, the court continued, "absent a waiver of [F]ifth [A]mendment rights, a person may not be compelled to submit to a polygraph examination."[143] The court then recognized that the "natural corollary" to that rule is that a defendant's refusal to submit to a polygraph cannot be used against him as evidence.[144] It nonetheless reasoned that because the Seventh Circuit had never explicitly held that the refusal to take a polygraph violated the Fifth Amendment, any error committed by the district court was not *plain*.[145] Finally, the court added that any prejudice to Resnick was

[137] *Id.* at 896-97 ("It is no surprise that our own decisions have, in practice, pointed in only one direction: affirming the *exclusion* of polygraph evidence.").

[138] *Id.* at 897.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* Miranda rights include the right to remain silent and the right to an attorney. Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). A custodial interrogation is any type of police questioning while an individual is deprived of his freedom in any significant way. *Id.* at 478.

[143] *Resnick*, 823 F.3d at 897.

[144] *Id.*

[145] *Id.* at 898.

minimal, as his refusal to take a polygraph was mentioned only once by each side during closing, the other evidence against him was strong, and his credibility could not have been impaired since he did not testify at trial.[146]

2. Substantial Rights

The court concluded by noting that Resnick failed to make a specific showing of prejudice in order to satisfy the substantial rights prong of the *Olano* test.[147] It argued that because the record as a whole pointed towards Resnick's guilt, any error committed during his trial had no effect on his substantial rights.[148]

B. Justice Bauer's Dissent

Contrary to the majority, Justice Bauer argued that the district court had committed reversible plain error.[149] He asserted that the district court's errors were both constitutional and evidentiary in nature.[150] In addition to noting that precedent concerning evidentiary rules clearly established that polygraph evidence should be excluded, Justice Bauer explained that precedent also clearly and obviously established that the Fifth Amendment prohibited a defendant's right to silence being used against him.[151] He asserted that the district court

[146] *Id.* at 898.

[147] *Id.*

[148] *Id.*

[149] *Id.* (Bauer, J., dissenting).

[150] *Id.* at 901 (Bauer, J., dissenting).

[151] *Id.* at 899 (Bauer, J., dissenting) ("[T]he constitutional privilege against self-incrimination … grant[s] … an absolute right.") (quoting Greene v. Finley, 749 F.2d 467, 472 (7th Cir. 1984)). Judge Bauer further noted that "the government is 'prohibit[ed] … from treat[ing] a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt.'" *Id.* (citing United States v. Ochoa-Zarate, 540 F.3d 613, 617 (7th Cir. 2008)). Additionally, "[i]f a defendant refuses to testify or invokes his *Miranda* rights, the prosecutor cannot comment on this refusal to the jury." *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 468 (1966)).

had violated a bedrock principle of the criminal justice system by imposing a penalty on a defendant for his exercising of a constitutional privilege.[152]

Justice Bauer was also disturbed by the majority's use of other evidence against Resnick in its plain error analysis.[153] He explained that the majority's reasoning implied that a court could ignore a defendant's rights if the evidence against him was strong enough.[154] He continued by asserting that the majority had misunderstood *Olano*'s fourth prong, and thereby was misinterpreting plain error review by implying that a defendant must prove his innocence in order for a plain error correction to be warranted.[155] The only issue on appeal, Justice Bauer argued, was whether Resnick received a fair trial, and the gravity of the district court's error indicated that he had not.[156]

THE SEVENTH CIRCUIT WRONGLY DECIDED RESNICK

The Seventh Circuit erred in its Resnick decision in four ways: (1) it failed to recognize that evidence incriminating a defendant for refusing to take a polygraph clearly violates the Fifth Amendment; (2) it ignored the gravity of the error; (3) it placed too much emphasis on the other evidence against Resnick; and (4) it ignored the error's injurious effect to the integrity of the judicial system. The Seventh Circuit's wrongful holding in *Resnick* is not surprising, however, given the disarrayed state of the plain error doctrine.

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[152] *Resnick*, 823 F.3d at 901 (Bauer, J., dissenting).

[153] *Id.* at 902 (Bauer, J., dissenting).

[154] *Id.*

[155] *Id.* ("[T]he Supreme Court noted in *Olano* that 'we have never held that' remand for plain error 'is *only* warranted in cases of actual innocence.' This court has reaffirmed that a defendant need not 'establish actual innocence' under *Olano* plain error review to trigger remand." (citing United States v. Driver, 242 F.3d 767, 771 (7th Cir. 2001)).

[156] *Id.*

A. The Seventh Circuit Failed to Appropriately Regard a Well-Recognized Constitutional Protection

The *Resnick* majority asserted that because the Seventh Circuit had never before explicitly held that the refusal to take a polygraph test implicated the Fifth Amendment, the prosecution's use of Resnick's refusal to take such a test was not plain error.[157] However, the court's reasoning for such a conclusion was acutely unsound and contradictory.

The majority spent a considerable amount of time explaining why polygraph examinations trigger Fifth Amendment protections.[158] The court not only contended that polygraph examinations elicit Fifth Amendment protections, but also that generally, that a defendant's refusal to submit to a polygraph may not be used as incriminating evidence.[159] To support this contention, the court cited to other circuit court opinions which have explicitly held that a defendant's refusal to submit to a polygraph examination cannot be used against him.[160] The court noted that a polygraph examination is almost always a custodial interrogation, which triggers *Miranda* rights, particularly the right to silence.[161] Therefore, the court asserted, a person may not be compelled to submit to a polygraph test, assuming the individual has not waived his right.[162]

Perplexingly, after acknowledging that using a defendant's refusal to submit to a polygraph violated the Fifth Amendment, the majority concluded that the prosecution's use of Resnick's refusal was not a plain error, as it had "never before held that the refusal to take a polygraph implicate[d] the Fifth Amendment."[163] This implied that in

[157] *Id.* at 898.

[158] *Id. at* 897-98

[159] *Id.* at 897.

[160] *Id.* at 897-98 (citing Garmon v. Lumpkin Cnty., Ga., 878 F.2d 1406, 1410 (11th Cir. 1989) and United States v. St. Clair, 855 F.2d 518, 523 (8th Cir. 1988)).

[161] *Id.* at 897.

[162] *Id.*

[163] *Id.* at 898.

order for a rule to be "clear," the Seventh Circuit must have previously ruled explicitly on a specific matter.

However, a rule, law, or precedent need not specify every type of circumstance which would fall under its purview. For example, an ordinance that prohibits motor vehicles from travelling in excess of thirty-five miles per hour on a roadway need not specify all modes of transportation qualifying as "motor vehicles." Perhaps the first thing that comes to mind is a car, but it would be illogical to reason that because the ordinance didn't specifically state that it also applied to motorcycles, motorcycles somehow fell out of the ordinance's ambit; a motorcycle is a *type* of motor vehicle after all.

Likewise, just because the Seventh Circuit has never *explicitly* ruled that a polygraph examination triggers the Fifth Amendment right to silence, it does not mean that a polygraph exam doesn't fall under the Fifth Amendment ambit. Just like in the motor vehicle example above, a polygraph examination is a *type* of custodial interrogation, which the Supreme Court has clearly stated triggers the Fifth Amendment right to silence and to not have that silence used against the accused.[164]

B. The Seventh Circuit Ignored the Gravity of the Error

The court failed to notice how the credibility of Resnick's case might have been undermined by the prosecution's comments about his refusal to submit to a polygraph. The court itself acknowledged that polygraph evidence entails a substantial possibility of prejudice because "the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt."[165] This misguided reliance, the court continued, had the possibility of leading jurors to believe that a person who refuses to take a polygraph

[164] *See* Griffin v. California, 380 U.S. 609, 615 (1965); Doyle v. Ohio, 426 U.S. 610, 618 (1976).

[165] *Resnick*, 823 F.3d at 897 (quoting Unites States v. Scheffer, 523 U.S. 303, 314 (1998).

has something to hide.[166] The court acknowledged that because of this reason, Seventh Circuit decisions reflected the unanimous exclusion of polygraph evidence.[167] However, the court dismissed the importance of the prosecution's actions in this case, reasoning that the Seventh Circuit had never adopted a *blanket* rule excluding polygraph evidence.[168]

In *Chapman v. California*, the Supreme Court acknowledged the egregiousness of introducing a defendant's exercise of his constitutional right to silence as incriminating evidence.[169]Although it refused to hold that any and all constitutional violations constituted reversible error, the Court equated the flagrancy of admitting a defendant's constitutional silence as evidence with a coerced confession,[170] and held that such an inference of guilt could not be considered a harmless error. "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*,[171] be conceived of as harmless."[172]

In his dissent, Judge Bauer also recognized the abhorrence of this type of error. Judge Bauer explained that the error committed by the district court in *Resnick*, violated a bedrock principle of the criminal justice system—imposing a penalty for exercising a constitutional right.[173] He correctly pointed out that by admitting Resnick's refusal to

[166] *Id.* at 896.

[167] *Id.* at 897.

[168] *Id.*

[169] *See* Chapman v. California, 386 U.S. 18, 26 (1967)

[170] *Id.*

[171] Fahey v. Connecticut, 375 U.S. 85, 86-87 (1963) (concluding that constitutional errors which had a reasonable possibility of contributing to the conviction should not be treated as harmless).

[172] *Chapman*, 386 U.S. at 23-24; *id.* at 26 (explaining that "Petitioners [were] entitled to a trial free from the pressure of unconstitutional inferences.").

[173] United States v. Resnick, 823 F.3d 888, 901(7th Cir. 2016) (Bauer, J., dissenting), *reh'g en banc denied*, 835 F.3d 658 (7th Cir. 2016); *see* United States v. Robinson, 485 U.S. 25, 36 (1988) (Blackmun, J., dissenting) (citing Weems v. United States, 217 U.S. 349, 362 (1910)) (recognizing that placing more weight on constitutional errors when assessing plain error is approved by precedent).

take a polygraph as substantive evidence, it implicitly led the jury to believe that polygraph tests are reliable and probative.[174] This misguided belief, he argued, tainted the entire case by inducing the jurors to place an undue amount of weight on Resnick's refusal to take a polygraph, thereby undermining Resnick's credibility.[175]

Finally, the court failed to take the context in which the comments by the prosecution were made into account. The Supreme Court has held that a prosecutor's wrongful comments must be looked at in context to determine their egregiousness.[176] In *Young*, the Court held that the prosecution's comments about its personal beliefs as to the defendant's guilt[177] were not plain error.[178] The Court reasoned that because the prosecution's comments came as a response to the defense counsel's insinuation that not even the prosecution believed in the defendant's guilt, the prosecution was merely defending his personal impression since defense counsel had asked for it.[179] The Court explained that any potential harm from the prosecutor's remark was mitigated by the fact that the jury understood that the comments were only made to defend an insinuation.[180] The Court concluded that although the prosecution's comments were wrongful, they did not compromise the jury's deliberations.[181]

Similar to the Supreme Court, the Seventh Circuit has held that prosecutorial comments referencing a defendant's constitutional rights must be viewed in context of whether (1) the prosecutor manifestly

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[174] *Resnick*, 823 F.3d at 901-02 (Bauer, J., dissenting).

[175] *Id.* (Bauer, J., dissenting).

[176] *See* United States v. Young, 470 U.S. 1, 10-11, 13-14 (1985); *Robinson*, 485 U.S. at 33 (explaining that a prosecutorial comment as to a defendant's silence must be looked at in the context under which the comment was made).

[177] A prosecutor may not comment as to his or her own personal belief as to the defendant's guilt because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 18-19.

[178] *Id.* at 20.

[179] *Id.* at 17-18.

[180] *Id.*

[181] *Id.* at 18.

intended to use the defendant's exercise of his right as evidence of guilt, or (2) the character of the remark would lead a jury to naturally and necessarily treat it as evidence of defendant's guilt.[182] In *Resnick*,[183] the prosecution very clearly intended to use Resnick's refusal to submit to a polygraph as substantive evidence of his guilt. First, the prosecution used Resnick's refusal in its case in chief.[184] During direct examination, one of the FBI agents who searched Resnick's home testified that Resnick had declined to take a polygraph without speaking to his counsel first and that, to his knowledge, Resnick never did end up taking one.[185] Moreover, during its closing argument, the prosecution told the jury it wanted to leave them with defendant's lies.[186] It proceeded to publish a demonstrative exhibit listing Resnick's answers to interview questions and noted that Resnick had refused to take a polygraph.[187] The prosecution then asserted that this refusal, coupled with his other denials, evidenced Resnick's consciousness of guilt.[188] Both of these instances, especially when coupled together, are an explicit, barefaced use of Resnick's exercise of his right to silence as substantive evidence of guilt. Furthermore, it is indisputable that these overtly incriminating remarks would be very likely to lead a jury to treat them as such.

C. The Seventh Circuit Placed an Inordinate Amount of Emphasis on the Other Evidence Against Resnick When Evaluating Prejudice

By focusing on the "overwhelming" evidence against Resnick to ultimately conclude that Resnick's substantial rights were not affected,

[182] United States v. Ochoa-Zarate, 540 F.3d 613, 618 (7th Cir. 2008).

[183] United States v. Resnick, 823 F.3d 888 (7th Circ. 2016), *reh'g en banc denied*, 835 F.3d 658 (7th Cir. 2016).

[184] *Id.* at 892.

[185] *Id.*

[186] *Id.* at 900 (Bauer, J., dissenting).

[187] *Id.*

[188] *Id.*

the Seventh Circuit turned plain error analysis into an inquiry over Resnick's guilt or innocence—a question not at issue under plain error analysis.[189] Most disturbingly, as Judge Bauer pointed out in his dissent, the court's holding implied that a court may ignore egregious violations of a defendant's constitutional rights if the evidence against him is strong enough.[190] Because jurors are not mandated to give the reasons for their decisions, in most cases it would be impossible for a defendant to show that an error influenced the jurors' decision.[191] As Judge Bauer pointed out in his dissent in *Resnick*, only a defendant who could show he was innocent would be able to make a showing that he suffered actual prejudice at the hands of an error.[192] For these reasons, instead of considering the "overwhelming evidence" against Resnick as *the* dispositive factor, the Seventh Circuit should have followed the precedent set by *Hills*[193] to determine whether Resnick's substantial rights were affected.

Notwithstanding the fact that neither the *Atkinson* standard nor the language of Rule 52(b) implicate the weight of evidence against the accused as part of plain error analysis, Judge Bauer, in his dissent on petition for rehearing en banc,[194] aptly noted that "[t]here is no evidentiary demarcation line that when traversed with enough damning evidence of guilt permits the government and the court to deny a criminal defendant the right to a fair jury trial."[195]

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[189] *See id.* at 902 (Bauer, J., dissenting) ("Resnick's guilt is not at issue on appeal; we only review whether he received a fair trial.").

[190] *See id.*

[191] *See* United States v. Olano, 507 U.S. 725, 743 (1993) (Stevens, J., dissenting) (explaining that some errors bearing on the jury's deliberations are subject to reversal partly because it is very difficult to measure the errors' effect on the jury's decision).

[192] *See Resnick*, 823 F.3d at 902 (Bauer, J., dissenting).

[193] The court in *Hills* applied a five-factor harmless error analysis to determine whether a defendant's substantial rights were affected. United States v. Hills, 618 F.3d 619, 641 (7th Cir. 2010).

[194] Judge Posner, Judge Flaum, and Judge Kanne joined in the dissent.

[195] United States v. Resnick, 835 F.3d 658, 660 (7th Cir. 2016) (dissent from denial of rehearing en banc).

D. The Court Ignored the Injurious Effect of the Error to the Integrity of the Judicial System.

As explained earlier, the *Atkinson* Court was concerned with an error's broad effect on the integrity of the judicial system.[196] However, the Seventh Circuit made no mention of this principle in its *Resnick* decision. As Judge Bauer recognized, the gravity of the district court's error affected the integrity of judicial proceedings.[197] The implications of allowing this type of error undermine the authority of the Constitution and give the government a carte blanche to violate a defendant's rights at trial. As long as there is enough evidence against the accused, the prosecution may feel free to use a defendant's constitutional privileges against him. Just as the Seventh Circuit should have followed its decision in *Hills* to determine whether Resnick's substantial rights had been affected, it should have also turned to *Hills* in its analysis of *Olano*'s fourth prong. In *Hills*, the court embraced *Atkinson*'s principle—the court looked beyond the effect of the error to just the defendant.[198] Instead, the court accounted for the error's injury to the integrity of the judicial system and for the demoralization of the Constitution.[199] I think you need a concluding thought here to tie this section up.

HOW PLAIN ERROR REVIEW SHOULD BE CORRECTED

Given the confusion created by the complexity of the *Olano* four-part inquiry it is not surprising that the Seventh Circuit wrongly decided *Resnick*. This confusion is patently apparent in the discrepancy between the *Hills* decision and the *Resnick* opinion despite the similarity of the facts. Today's version of plain error

[196] *See* United States v. Atkinson, 297 U.S. 157, 160 (1936) (citing New York Central R. Co. v. Johnson, 279 U.S. 310, 318 and Brasfield v. United States, 272 U.S. 448, 450 (1926)).

[197] *Resnick*, 823 F.3d at 902 (Bauer, J., dissenting).

[198] *See Hills*, 618 F.3d at 642.

[199] *Id.*

analysis has strayed too far from the principles supporting *Atkinson*. Instead of focusing on the gravity of an error or its effect on the integrity of the court, today's standard narrowly focuses on the effect of the error on the particular outcome of a case. This is evidenced by *Olano*'s requirement of a showing of *actual* prejudice by a defendant. As discussed earlier in this Comment, this is not a part of the plain error doctrine. Instead, this extremely high hurdle is more reminiscent of the more stringent cause and actual prejudice standard as explained in *United States v. Frady*.[200] For all practical purposes, a showing of actual prejudice essentially requires that a defendant show that he is innocent because of the extreme difficulty of showing that a jury would have decided differently had the error not been introduced.

This required showing of prejudice is at the heart of the problem with today's plain error doctrine. No court has been able to quantify exactly how much prejudice must be shown in plain error analysis. Adding to the confusion is *Olano*'s failure to unpack what it meant by asserting that plain error must be found only in cases where failure to correct the error would result in a "miscarriage of justice."[201] The *Olano* Court explained that in collateral review jurisprudence, the term "miscarriage of justice" meant that the defendant was actually innocent, and while the court asserted that this would suffice to satisfy the fourth prong of its test, a showing of innocence was not necessary.[202] The problem, however, is that the Court failed to indicate what else besides a showing of innocence qualified as a miscarriage of justice under plain error review.

In order to repair the plain error doctrine, courts must return to the principle in which the doctrine was grounded—namely the need for public faith in the integrity of the judicial system. This requires that courts return to focusing plain error analysis on the egregiousness of the error and its effect on the public's confidence in the fairness of

[200] United States v. Frady, 456 U.S. 152, 167-68 (1982).

[201] *See* United States v. Olano, 507 U.S. 725, 736-37 (1993). Recall that *Olano* equated miscarriage of justice with its fourth prong of "seriously affecting the fairness, integrity or public reputation of judicial proceedings." *Id.*

[202] *Id.* at 736.

judicial proceedings. In interpreting Rule 52(b), courts must be cognizant of these principles. The *Hills* decision provides a good working standard for application of the complicated "substantial rights" inquiry. The five factors the *Hills* court applied to determine whether the defendant's substantial rights had been imposed on[203] are in keeping with Rule 52(b)'s language, which only requires that the error *affect* substantial rights. Importantly, by applying the five factors used in *Hills,* other evidence weighing on the defendant's guilt is relegated to being just one of five factors to be weighed, rather than being dispositive.

Plain error review would be best served if the *Olano* test was retained but altered to reflect the spirit of *Atkinson.* First, the first and second prongs should be retained to determine the gravity of the error, with constitutional violations studied more scrupulously. Second, the test should include the factors in *Hills*[204] to determine whether a defendant's substantial rights were violated. Finally, an appellate court should consider whether the judicial system would be harmed in light of the egregiousness of the error. Under this plain error analysis, Resnick's conviction would have more than likely been vacated and the case remanded for further proceedings, which would have been the correct result.

CONCLUSION

Plain error review was grounded in the principle that courts should correct errors that, if left unrectified, could undermine the

[203] These five factors are: (1) the intensity and frequency of the wrongful prosecutorial remarks; (2) which party elected to pursue the line of questioning; (3) the use to which the prosecution put the defendant's Fifth Amendment silence; (4) the trial judge's opportunity to grant a motion for mistrial or give a curative instruction; and (5) the quantum of other evidence indicative of guilt. *Hills*, 618 F.3d at 641.

[204] *Id.*

integrity of the judicial system.[205] The *Atkinson* plain error standard embodied this principle. The United States Supreme Court, however, has over time strayed from this original standard by focusing more narrowly on the outcosme of a particular trial. The complexity and vagueness of the current doctrine has created confusion and inconsistency of decisions, including within the Seventh Circuit. The doctrine must be revised to look beyond any damage an uncorrected error may cause to a single individual. Instead, plain error analysis must also account for something greater—the public's faith in our judicial system.

[205] *See* United States v. Atkinson, 297 U.S. 157, 160 (1936); New York C.R. Co. v. Johnson, 279 U.S. 310, 318-19 (1929); Brasfield v. United States, 272 U.S. 448, 450 (1926).